

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEM ELLIS GROVE,

Defendant-Appellant.

UNPUBLISHED

July 7, 2005

No. 255397

Wayne Circuit Court

LC No. 04-014085

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to twenty to forty years' imprisonment for the conviction. We affirm.

Defendant and codefendant went to the home of the victim's cousin, where they expected to exchange a pair of sunglasses for money and marijuana from the victim and his cousin. Defendant, codefendant, the victim, the victim's friend, and the victim's cousin were in the garage when codefendant struck the victim's cousin with his gun. Gunshots ensued, and the victim died from multiple wounds. Codefendant and defendant also sustained gunshot wounds.

Defendant first argues that there was insufficient evidence to support his second-degree murder conviction. We review de novo challenges to the sufficiency of the evidence in criminal trials to determine whether, viewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002).

Murder is a common-law offense, defined as the unlawful killing of one human being by another with malice aforethought. *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998). Second-degree murder consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Goecke, supra* at 463-464. Malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464.

Circumstantial evidence and reasonable inferences that arise from the evidence may constitute sufficient proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502

NW2d 177 (1993). The Court should not interfere with the jury's role in determining the weight of evidence or the credibility of a witness. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Nasir*, 255 Mich App 38, 45; 662 NW2d 29 (2003).

In the instant case, the victim's cousin saw defendant aim his gun at the victim. Defendant admitted to the police that he had fired two gunshots in the direction of the victim and the victim's friend. The victim died of multiple gunshot wounds, and a bullet found in his body was fired from defendant's revolver. Thus, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant shot and killed the victim with malice and without justification or excuse. *Goecke*, *supra* at 463-464.

A person has the right to use force to defend himself under certain circumstances, and lawful self-defense will excuse a defendant from homicide. *People v Riddle*, 467 Mich 116, 126, 142; 649 NW2d 30 (2002). To constitute lawful self-defense, the evidence must show that: (1) the defendant honestly and reasonably believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. *Id.* at 119, 120 n 8. If there is proof that a defendant's belief of imminent danger was not honest or reasonable, his self-defense claim fails. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

The evidence supports a finding that defendant was not acting in self-defense when he shot and killed the victim. In his statement to the police, defendant admitted that he did not see the victim or the victim's friend with a weapon. The victim's cousin saw defendant point his gun at the victim. Although defendant also told the police that codefendant saw the victim and/or the victim's friend with a gun, absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Thus, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find that defendant did not act in self-defense.

Defendant next argues that the trial court erred in denying his motion for directed verdict because there was insufficient evidence for the first-degree and felony-murder charges to be submitted to the jury. When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor up to the time of the motion for directed verdict, viewed in the light most favorable to the prosecutor, could have persuaded a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

The elements of first-degree premeditated murder are: (1) the defendant intentionally killed the victim; and (2) the act of killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id.*

Defendant argues that there was not enough evidence to support the trial court's decision to submit the first-degree murder charge to the jury. The victim's cousin testified that after they all gathered in the garage, defendant left for a couple minutes. Defendant returned with codefendant, and they both had revolvers in their hands. Although conflicting evidence was presented at trial, absent exceptional circumstances, issues of witness credibility are for the jury. *Lemmon, supra* at 642. This testimony, combined with the same evidence discussed *supra*, which supports the guilty verdict for second-degree murder, supports the trial court's decision to allow the first-degree murder charge to be decided by a jury. *Kelly, supra* at 642.

Defendant also argues that there was insufficient evidence of felony murder to allow this charge to be submitted to the jury. The elements of felony murder are: (1) a human being was killed, (2) with malice, and (3) during the commission or attempted commission of one of the felonies enumerated in MCL 750.316(1)(b), including attempted larceny of any kind. *People v Watkins*, 247 Mich App 14, 32; 634 NW2d 370 (2001), *aff'd* in part and *mod* on other grounds 468 Mich 233 (2003). Larceny is a trespassory taking and carrying away of the personal property of another with intent to steal it. *People v Adams*, 416 Mich 53, 58 n 6; 330 NW2d 634 (1982). An attempt consists of (1) an attempt to commit an offense prohibited by law, and (2) any act toward the commission of the intended offense. *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

The same evidence discussed *supra*, which supports the guilty verdict for second-degree murder, also supports the trial court's decision to allow the felony-murder charge to be decided by a jury when considered in conjunction with the evidence that defendant was planning to rob the victim. Although conflicting evidence was presented at trial about whether defendant planned to rob the victim, absent exceptional circumstances, issues of witness credibility are for the jury. *Lemmon, supra* at 642. There was sufficient evidence for a jury to find that defendant committed felony murder when he attempted to rob the victim and fired multiple gunshots at him. *Watkins, supra* at 32. Therefore, there was sufficient evidence to allow the felony-murder charge to be decided by the jury.

Defendant next argues that admission of the non-testifying codefendant's confession to the police violated his Sixth Amendment right to confrontation. We review this claim of error to determine whether it was harmless beyond a reasonable doubt. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

The Confrontation Clause requires the unavailability of a witness and a prior opportunity for cross-examination before admitting testimonial evidence against a defendant. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *McPherson, supra* at 132. In the instant case, codefendant implicated defendant in the victim's murder when he gave statements to the police. Therefore, codefendant's statements were testimonial evidence. *McPherson, supra* at 132. Codefendant did not testify at trial and was therefore not subject to cross-examination. Accordingly, the trial court erred in admitting the testimonial statements of the non-testifying codefendant into evidence. *Crawford, supra* at 68.

To establish that a constitutional error is harmless, it must be clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent the error. *People v Shepherd*, 472 Mich 343; ___ NW2d ___ (2005), *slip op*, p 5. In the instant case, codefendant's statements were not the primary evidence supporting defendant's conviction. The victim's

cousin saw defendant point his gun at the victim. Defendant admitted to the police that he had fired two gunshots in the direction of the victim and the victim's friend. The victim died of multiple gunshot wounds, and a bullet found in his body was fired from defendant's revolver. Because there was overwhelming evidence of defendant's guilt without codefendant's statements, we find that the error was harmless beyond a reasonable doubt.¹ *Id.*

Defendant contends that he was denied his right to effective assistance of counsel when his counsel acquiesced to the admission of codefendant's statements. Because defendant failed to move for a new trial or *Ginther*² hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective, and he must overcome the presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003); *LeBlanc, supra* at 578.

Defendant has failed to overcome the presumption that he received effective assistance of counsel at trial. Any error counsel may have committed in failing to object to the admission of codefendant's statements would be harmless as discussed *supra* in light of the overwhelming evidence of defendant's guilt. Defendant has therefore failed to demonstrate that the result of the proceeding would have been different if counsel had objected to the admission of codefendant's statements. *Bell, supra* at 695; *Rodgers, supra* at 714.

Lastly, defendant argues that he was denied a fair trial by the trial court's refusal to provide him with a separate jury from that of codefendant. We review a trial court's decision whether to use separate juries for an abuse of discretion. *People v Hana*, 447 Mich 325, 346, 351-352; 524 NW2d 682 (1994).

¹ This Court typically reviews unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). However, we find the harmless-error standard of *McPherson* to be appropriate. See *People v Bell*, 264 Mich App 58, 63; 689 NW2d 732 (2004). Because we would reach the same result under either the harmless-error standard of *McPherson* or the plain-error standard of *Carines*, we decline to address the issue at this time.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Although there is a strong policy favoring joint trials, a defendant does not have an absolute right to a separate trial. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). “The use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials.” *Hana, supra* at 351. Separate juries, under MCR 6.121(C), are required only when a defendant plainly and affirmatively demonstrates that the use of a joint jury will prejudice his substantial rights and that separate juries are necessary to rectify the potential for prejudice. *Id.* at 351-352. Severance under MCR 6.121(C) is required when the codefendants’ defenses are “mutually exclusive” or “irreconcilable.” *Id.* at 349. “Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.” *Id.* “Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice.” *Id.* at 346.

Defendant does not argue that his position and codefendant’s position were antagonistic or mutually exclusive. Defendant’s theory at trial was that the victim and his cousin set a trap and tried to rob defendant and codefendant. Defendant asserted that he fired his gun to protect himself. Codefendant also advanced the theory that he and defendant were expecting to exchange the sunglasses for money and marijuana, and the victim surprised them by trying to rob them. However, defendant argues that separate juries were necessary because his jury should not have been exposed to codefendant’s statement, which violated his substantial right to confrontation. The trial court instructed the jury that they may not use codefendant’s statements as evidence against defendant. Jurors are presumed to follow the trial court’s instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Additionally, as discussed *supra*, there was sufficient evidence to convict defendant of second-degree murder without using codefendant’s statement. Defendant has therefore failed to demonstrate that his substantial rights were prejudiced by the trial court’s decision not to provide him with a separate jury.

Affirmed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad